IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 1106 147

SOUTHERN RAILWAY COMPANY, *Petitioner*,

v.

PAULINE G. JESTER, as Administratrix of the Estate of Claude V. Jester, deceased, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

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STATUTES AND COURT RULES

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Petitioner prays this Court to review on writ of certiorari a judgment of the Supreme Court of South Carolina, in the case there (invertedly) entitled *Pauline G. Jester, as Administrator (sic) of the Intestate Estate of Claude V. Jester, Respondent*, v. *Southern Railway Company, a Corporation, Appellant*, Case No. 2496, rendered on the 7th day of April, 1944 (R. 51-61), and based upon a written opinion by that court rendered on the same date (R. 51-61), Opinion No. 15636, which judgment became final on the 28th day of April, 1944, by the entry on that date by the court below of an order overruling petitioner's petition for rehearing thereof (R. 67), which judgment affirmed a judgment of the Court of Common Pleas for Greenville County, South Carolina, upon a jury verdict in favor of respondent in the amount of $30,000, under the Federal Employers' Liability Act (35 Stat. 65, 36 Stat. 291, 53 Stat. 1404), 45 U. S. C.

51-59, for the alleged wrongful death of her intestate, a locomotive fireman, on July 28, 1942, when, while on a trip on a freight train, "an argument arose between the fireman and engineer, resulting in the death of C. V. Jester, the fireman, caused by pistol shots fired into his body by C. H. Black, the engineer" (R. 51).

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Questions Presented.

1. When a locomotive engineer, without any signal or order to do so, but in violation of his conductor's order to him and his fireman "to quit fussing and get back on the engine and get their work done," stops his locomotive, draws a pistol and maliciously shoots the fireman twice, almost instantly killing him, in pursuance of a personal quarrel between the two, can it be held that the fireman's death resulted "in whole or in part from the negligence" of the engineer, so as to make the employer railroad liable therefor under the Federal Employers' Liability Act?

2. Even if such malicious homicide by the engineer can be held to be within the breadth of the term "negligence" as used in the Act, can it be held to have been committed within the scope of his employment or in the furtherance of his master's business, so as to make the railroad liable therefor under the Act?

Petitioner submits that the answer to each of those questions is "No" as matter of law.

If "No" is not the answer to those questions as matter of law—if they can both be answered "Yes"—then a third question arises:

3. Under the evidence in this case can it be correctly held that the malicious homicide, or murder, of the fireman by

the engineer, was *in fact* within the scope of his employment or in the furtherance of his master's business?

The answer to that question, if it is reached, is plainly "No," under the decisions of this Court.

Pleadings.

Two grounds of asserted liability of petitioner were presented by respondent's complaint (R. 5-10):

1. That Engineer Black was a turbulent and violent person in his conduct toward other employees and habitually carried a pistol about his person in the performance of his duties, of which facts petitioner's superior officers had knowledge and notice and that petitioner was negligent in retaining Black in its employ.

2. That Engineer Black threatened and abused the deceased in giving orders about the use by the deceased of the water injector of said locomotive; and, in attempting to enforce his orders as to the injector, that he negligently shot the deceased *twice*, while both the engineer and the fireman were engaged in the work assigned to them and while Black was in the actual scope of his agency as engineer; and that Black, while acting within the scope of his agency and employment, shot the deceased in enforcing his orders and instructions as engineer, *while the fireman was using the coal scoop in the performance of his duties.* (Italics ours.)

No evidence was offered by respondent to sustain the *first* above ground, and it was specifically abandoned below (R. 4, 52). Only the *second* above ground remains in the case to support the judgment below. (R. 52.)

Trial.

All of the evidence is respondent's. Petitioner offered no evidence. At the close of the evidence petitioner moved for directed verdict. Its motion was overruled. The jury returned a verdict of $30,000 against petitioner, upon which judgment was rendered by the trial court, and petitioner ap-

pealed, relying on its motion for directed verdict and on the overruling thereof. See *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479-480.

The Evidence.

In its opinion the court below gave a very fair summary of the evidence (R. 53-55), which we quote. We insert in our own footnotes certain matters which we have taken from the record evidence, in order to clarify or to make more exact what the court below said about, or quoted from, the evidence, and we italicize certain matters for emphasis.

"Charles W. Ambrose, an employee of the appellant, testified that he was supply man at the roundhouse of appellant at Greenville, S. C.; and in preparing the engine on which Black and Jester were the engineer and fireman, respectively, to go on the run, he placed a machinist hammer on the righthand side of the watertank, the engineer's side, and that this hammer was there when the engine left the roundhouse; that it was usual or customary to place such a hammer on the watertank or engine when it was going out on a trip, but it could be put on either side of the watertank.

"G. H. Short, the conductor on the train, testified that between Greenville, the starting point of the train, and the place of the shooting, about half way between Wellford, S. C., and Lyman, S. C., it was necessary for the engine to do considerable shifting of cars in the placing of empty cars and the picking up of loaded cars at various points; that he rode in the engine out of Greer, S. C., to a siding near there, and noticed the hammer on the corner of the tank on the engineer's side; that at Wellford, while the train was stopped and he was in the telegraph office, he heard the engineer and fireman 'fussing' with each other, at which time they were on the engine, but both got off the engine on to the ground on the opposite or farther side of the engine from the telegraph office (the record does not disclose if this was the engineer's or fireman's side of the engine); that he went out where they were and inquired as to the

trouble between them, and the engineer said he had told the fireman to keep his hands off the water injector, and he wouldn't do it; that the injector puts cold water in the boiler, which is necessary to the operation of the engine, and there is one both on the engineer's and fireman's side, so that either can conveniently operate it; that the injector is operated by the pulling down of a lever; that it is usually a matter of mutual understanding as to which would operate the injector, but that the engineer, being in charge of the engine, had the authority to elect if it should be used solely by himself; that it was necessary that this injector be operated every fifteen or thirty minutes; *that he told them to*[1] *get back on the engine and get their work done, and after arguing again as to which would first get back on the engine, the fireman finally preceded the engineer*, and considerable shifting of cars was done in and around Wellford and the train proceeded to a pass track where the shooting took place; that this[2] was about one and one-half hours after the trouble between the engineer and the fireman at Wellford; that the train was backed up the main line to said passing track, and upon reaching the switch to the pass track the train was stopped to open the said switch; that as the train was backing in on the pass track, *the engine and cars came to a stop without any signal so to do*, which attracted his attention to the engine; *that he saw the engineer get off the seat box and heard him and the fireman quarreling;* that he was then about one hundred and sixty feet away; that he started walking back toward the engine and when he had walked the length of one car, forty feet, he heard a shot fired, and the fireman exclaim, 'Oh, Lord, Dick,' and then[3] a second shot was fired; that 'Dick' was the engineer; that following the second shot, 'I saw the bulk of something come out of the engine to the ground; I don't know whether it fell out or jumped out; and I kept going

[1] "quit their fussing and" (R. 17).

[2] the shooting, at the pass track (R. 21).

[3] "at that moment" (R. 19).

up that way and when I got in a couple of car lengths of the engine the engineer got up off the ground and came back meeting me, or apparently from the ground; and I said, "You have played the devil now," and he said,[4] "He was after me with a hammer, "; that the engineer said they came out of the engine together; that Jester was[5] in a dying condition when he reached him, and there was no hammer on the ground where he was lying; that another train was coming, so he instructed the engineer to back the train and get in the clear; that upon getting on the engine he looked for the hammer and it was on the same corner of the tank where he had seen it earlier at Greer; that he called the engineer's attention to the hammer on the corner of the tank, and the engineer said: 'How come that there, when he struck at me, I throwed my arm and it fell over there'; *that the fireman's cap and glove, and the coal scoop were on the deck of the engine (the floor of the engine) about the center.*[6]

"The widow of Jester (also the respondent herein in her representative capacity) testified as to her dependency and that of their children upon the earnings of the deceased, and the amount thereof, etc., and exhibited in court the overalls and overall jumper worn by Jester at the time he was shot and killed, which bore evidence of a bullet hole over the right hip, and one on the left side just about the middle of the pocket of the overall jumper.

"The testimony showed that the engineer, Black, weighed about 250 pounds and that the fireman, Jester, weighed between 135 and 140 pounds, and both appeared to have normal health, but we attach no particular importance to the difference in weight of the two men.

"It was on the foregoing testimony that appellant's motion for a directed verdict was overruled, and the case submitted to the jury."

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[4] "I had to do it" (R. 24).

[5] on the ground (R. 19).

[6] "all laying there together" (R. 22).

Aside from what the court below said, as above quoted, about the evidence, we may mention the following facts, disclosed by undisputed evidence or testimony on direct and cross-examination, but not noticed by the court below. It summarized only the direct examinations, not noticing the cross.

After the train was got in the clear an ambulance was called for the deceased, Jester. The conductor reported to the superintendent by telephone what had happened, and officers came out later and arrested Mr. Black, the engineer. (R. 21.)

Respondent offered in evidence the following rules of petitioner (R. 22-23):

> "1292. They (engineers) are responsible for proper handling of the engines for care of equipment; economical use of fuel and supplies; the performance of duty by their firemen, instructing them when necessary; report incompetence or neglect of duty to proper officer."
>
> "1324. They must instruct firemen as to the operation and care of engines, and may allow them to handle the engine at stations, under their supervision."
>
> "1365. Firemen will report to the Train Master, Superintendent and Master Mechanic in their respective departments. Within shop and engine house limits they must obey the orders of the foreman. When with an engine they must obey the orders of the engineman."

On cross-examination the conductor testified:

When the "bulk" came toppling out of the engineer's side of the engine, he saw only one bulk. That would suggest they were grappling together and came out. And that was on the engineer's side. (R. 24.)

> Q. And you say Mr. Jester was on the ground and the only sign of life was a little sort of rattling in his throat?
>
> A. Yes, sir.
>
> Q. And he was dead in no time, was he not?

A. When I got the train in the clear and got back he was dead.

Q. Did he ever show any signs of consciousness?

A. No, sir, he never did move. (R. 25-26.)

Re-direct:

Q. Mr. Short, the throttle and brakes are on the engineer's side?

A. Yes, sir.

Q. So that only he could stop the engine?

A. Yes, sir. (R. 27.)

The Mortuary (*sic*) Table, Section 735, Code of South Carolina, was put in evidence. (R. 31.)

The foregoing comprises all of the material evidence.

Petitioner's Motion for Directed Verdict.

Petitioner's (defendant's) motion for directed verdict was as follows (R. 31-32):

> "The defendant moves for a directed verdict upon the following grounds:
>
> "1. Because the plaintiff has failed to establish by the preponderance of the testimony any actionable negligence on the part of the defendant or its agents or servants which would sustain a verdict against the defendant.
>
> "2. Because the testimony fails to show that the death of plaintiff's intestate was due to the act of an agent or servant of the defendant, acting within the scope of his agency, and in furtherance of the defendant's business.
>
> "3. Because the testimony is susceptible of no other reasonable inference than that the act of the engineer in taking the life of plaintiff's intestate, was done for purely personal reasons and not in the course of his employment or in furtherance of the master's business.
>
> "4. Because a verdict against the defendant could be predicated purely upon conjecture, since the testimony fails to establish by the degree of proof required that the engineer at the time he took the life

> of plaintiff's intestate was acting within the scope of his authority or in the furtherance of the master's business."

Each of the grounds upon which the motion was based was specifically preserved and presented to the court below by petitioner's exceptions. (R. 48-50.)

The Decision Below.

It Was Erroneous.

Upon all the evidence, there were two, and only two, ultimate conclusions which might have been reached by the jury and by the court below, either:

> 1. That Engineer Black killed Jester acting in his own legitimate self-defense, when Jester was attacking him with a hammer; or
>
> 2. That Black did not act in legitimate self-defense, in which case he was guilty of wilful and malicious homicide or murder.

Obviously, if Black was acting in legitimate self-defense, he was not guilty of negligence. It would be negligence not to defend himself against a felonious assault.

Obviously, the jury and the court below rejected the self-defense alternative. The trial court specifically charged the jury that, if it found that Jester was violently assaulting Black and thereby caused Black to shoot and kill him, respondent could not recover (R. 44). We think the rejection of the self-defense alternative was probably correct, in view of the evidence that the hammer was in the same position before and after the shooting, in view of Black's lame attempt to explain this incriminating circumstance, and especially in view of the fact that Black shot Jester twice and shot him in the back. The first shot might have been, though it probably was not, in self-defense. The second shot was murder or at least, wilful homicide.

It results that the inescapable conclusion is that Black did not act in legitimate self-defense, but committed murder or wilful homicide, without justification. It is in that aspect that the legal questions arising must be decided.

The court below, treating the case in that aspect, based its decision on the supposed authority of the decisions of this Court in *Jamison* v. *Encarnacion*, 281 U. S. 635, and in *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642. Those cases are entirely distinguishable from this case because:

1. Neither of those cases involved murder, wilful homicide, or murderous assault. If it be argued that this distinction is only a question of difference in degree of crime, or in degree of result, the answer is, as said by Mr. Justice Holmes, in *Irwin* v. *Gavit*, 268 U. S. 161, 168:

> "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law."

and as said by Chief Justice Stone, in *Harrison* v. *Schaffner*, 312 U. S. 579, 583:

> " 'Drawing the line' is a recurrent difficulty in those fields of the law where differences in degree produce ultimate differences in kind. See *Irwin* v. *Gavit*, 268 U. S. 161, 168."

Nothing is more familiar in the law than the ultimate differences in kind, dependent upon the differences in degree, between simple, non-murderous, though wilful, assault, such as was involved in the *Encarnacion Case* and in the *Alpha Steamship Case*, and intentional, malicious homicide, or murder, such as is involved in our case, or the differences in degree, and hence in kind, in homicide itself, manslaughter, murder in the second degree, murder in the first degree.

2. The simple, non-murderous, assaults committed by the superior against the inferior servants in those cases were both undisputedly committed in the furtherance of the master's business—in the *Encarnacion Case*, "to hurry him about the work" (p. 638), and in the *Alpha Steamship Case*,

"for the purpose of reprimanding him for tardiness and compelling him to work" (p. 643). The murderous assault by shooting twice with a pistol, in our case, could not have been made with any purpose to hurry Jester with his work or to compel him to work. Its only purpose and only possible effect were to impose capital punishment upon him and completely to stop him from work, *to put an end entirely to the furtherance of the master's business until Jester's remains could be disposed of, Black could be arrested, and a new engine crew provided.* This result was inescapable from the very nature of Black's act, and no other could have been anticipated.

3. The assaults involved in the *Encarnacion Case* and in the *Alpha Steamship Case* were committed on seamen on shipboard, where, from the very nature of the situation of confinement and discipline, as carefully pointed out by this Court in *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 377-378, "conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties," where " 'the ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly,' " and since "Congress did not mean that the standards of legal duty must be the same by land and sea." Care must be taken, if the law is not to be warped, not to push the doctrine of the *Encarnacion Case* and of the *Alpha Steamship Case* too far, as applied to land liability of railroads. We submit the court below pushed that doctrine too far.

4. The *Encarnacion Case* and the *Alpha Steamship Case* turned, in last analysis, upon a rule of liberal and reasonable construction of the word "negligence" in the Federal Employers' Liability Act, *as applied to seamen on ships*, "wards of admiralty," rejected a construction "narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning" and held that the Act must be "construed liberally to fulfill the purposes for which it was enacted * * *" (281 U. S. at 640). But, in *B. & P. Steamboat Co.* v. *Norton*, 284 U. S. 408, 414, this

Court characterized that rule of construction as being one for the liberal construction of the Act in furtherance of its purpose "and, if possible, so as to avoid incongruous or harsh results." Nothing could produce a more incongruous or harsher result than to push that rule of construction to the point of holding a railroad liable, as for "negligence," for the malicious, unprovoked, wilful homicide or murder of a fireman by an engineer, on the facts of this case. Reasonableness, as a rule of construction, works both ways. It is not a one-way street. Neither is liberality.

5. Upon a very careful research no case has been found in any state or federal court, since the state court decisions reversed by this Court in *Davis* v. *Green*, 260 U. S. 349, and in *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, holding a railroad liable for a wilful homicide of an employee by another employee or extending the doctrine of the *Encarnacion* and *Alpha Steamship Cases* to such a situation. All the authority is to the contrary. Indeed, a railroad is not liable, under this Court's decisions, for the wilful killing of an employee by outsiders, strikers or robbers. See *St. Louis, etc., R. Co.* v. *Mills*, 271 U. S. 344; *Atlanta & Charlotte Air Line R. Co.* v. *Green*, 279 U. S. 821, reversing, *per curiam*, 151 S. C. 1, 148 S. E. 633, on authority of *Davis* v. *Green*, *supra*, *St. Louis, etc., R. Co.* v. *Mills*, *supra*, and *Atlantic Coast Line* v. *Southwell*, *supra*.

On the above five grounds we submit that this case is wholly distinguishable from *Jamison* v. *Encarnacion* and from *Alpha Steamship Corp.* v. *Cain*, and that the court below erred in holding those cases to be controlling here.

On the contrary, *Davis* v. *Green*, 260 U. S. 349, is controlling, on the facts of that case and on the facts in this case. In principle they are indistinguishable. Yet the court below refused to follow *Davis* v. *Green*.

In that case, as in this, an engineer committed a wilful homicide on a fellow servant. He first upbraided a negro switchman for repeating signals when the engineer had told

him to give a signal but once. The negro told him that he was doing his duty as best he could under instructions of the conductor (the deceased). Thereupon the engineer, in a rage, told the negro that he would kill him and the conductor. He then knocked the negro switchman off the running board with a hammer, incapacitating him so that he had to be sent to a hospital. The engineer moved the train on to a switch, which had to be thrown before he could proceed; so he stopped the engine, waiting for the throwing of the switch, which could not be done by the switchman whom the engineer had himself incapacitated. Accordingly the conductor proceeded from the cars toward the switch, to throw it. The engineer came down from his engine with a pistol and took his stand near the front of the engine, and, as the conductor came up, accosted him with the remark, "Why in the hell have you not thrown the switch?" He then fired the pistol *two or three times, killing the conductor.* (See 125 Miss. 476, 87 So. 649.)

There was also, in that case, evidence that the engineer was a vicious, quarrelsome and dangerous man and that the railroad retained him in its employ with knowledge thereof, *a ground of liability which has been abandoned in our case.* (See 87 So. at 651.)

Reversing a judgment of the Supreme Court of Mississippi which had affirmed a judgment against the railroad in favor of the administratrix of the deceased conductor, this Court, in *Davis* v. *Green*, 260 U. S. 349, in a unanimous opinion by Mr. Justice Holmes, said (pp. 351-352):

> "Whatever may be the law of Mississippi a railroad company is not liable for such an act under the statutes of the United States."

This Court has reaffirmed *Davis* v. *Green* in *St. Louis, etc., R. Co.* v. *Mills*, 271 U. S. 344, 346; *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, 65; *Atlanta & Charlotte Air Line R. Co.* v. *Green*, 279 U. S. 821; and *Chesapeake &*

Ohio Ry. Co. v. *Bryant*, 280 U. S. 404; and it has never, in any subsequent decision, so far as we can find, cast any doubt upon that leading case.

Mr. Justice Butler's opinions in *Jamison* v. *Encarnacion*, 281 U. S. 635, and in *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, cast no doubt whatsoever upon the soundness of the decision in *Davis* v. *Green* or in the other cases which have followed it. In fact neither *Davis* v. *Green* nor any of the cases which have followed it was mentioned in the *Encarnacion Case* or in the *Alpha Steamship Case*. Obviously this Court did not deem the *Encarnacion Case* and the *Alpha Steamship Case* to be assimilable to *Davis* v. *Green* and the cases which have followed it.

It is clear that *Davis* v. *Green* and the cases following it are controlling of our case, unless they have all been overruled *sub silentio* by the *Encarnacion Case* and the *Alpha Steamship Case*, and that has never been suggested by this Court or, so far as we can find, by any other court.

The court below did not suggest such *sub silentio* overruling. In fact it said expressly that it did not regard the *Encarnacion Case* and the *Alpha Steamship Case* as being in conflict with *Davis* v. *Green* (R. 55). Yet it made no effort to distinguish this case from *Davis* v. *Green* or to demonstrate how this case was controlled by the *Encarnacion Case* and the *Alpha Steamship Case*. It simply preferred to follow the non-applicable doctrine of those later cases and refused to follow the applicable doctrine of *Davis* v. *Green* and of the cases in which this Court has followed and reaffirmed that leading case. (R. 55-57.)

Davis v. *Green* has been followed also in: *Birks* v. *United Fruit Co., Inc.* (D. C., N. Y.), 48 F. (2d) 656, distinguishing *Jamison* v. *Encarnacion;* in *American Ry. Express Co.* v. *Tait*, 211 Ala. 348, 100 So. 328, 330; in *McCarty* v. *Mitchell*, 169 Miss. 82, 151 So. 567, 569, a case quite analogous on the facts to ours, although it did not involve homicide, but only

a murderous assault; in *Ward* v. *Southern Railway Co.*, 206 N. C. 530, 174 S. E. 443, 444; in *Popadines* v. *Davis* (App. Div.), 209 N. Y. S. 689, 691, a "skylarking" injury case; in *Johnston* v. *Atlantic Coast Line R. Co.*, 183 S. C. 126, 190 S. E. 459, 463; in *Osment* v. *Pitcairn*, 349 Mo. 137, 159 S. W. (2d) 666, 668, certiorari denied for want of jurisdiction, 317 U. S. 587, a rough "horseplay" injury by a fellow servant on a railroad, also distinguishing *Jamison* v. *Encarnacion;* and in *Quinn* v. *American Range Lines*, 344 Pa. 85, 23 A. (2d) 487, 489, certiorari denied 316 U. S. 677, following *Davis* v. *Green* and distinguishing *Jamison* v. *Encarnacion.*

The decision of this Court in the recent case of *De Zon* v. *American President Lines*, 318 U. S. 660, teaches us that it is still the law that evidence of negligence may be insufficient for submission to a jury, even in a seaman's case, and it cites *Jamison* v. *Encarnacion* (318 U. S. at 671) to the proposition that damages may be recovered under the Jones Act only for negligence.

Jamison v. *Encarnacion* has been distinguished, on facts often analogous to those in our case, in the following: *Escandon* v. *Pan American Foreign Corp.* (D. C., Tex.), 12 F. Supp. 1006, 1007, affirmed (C. C. A., 5th), 88 F. (2d) 276, drunken seaman handcuffed and confined to quarters to prevent him damaging the ship, its contents, and persons on board, held not entitled to recover damages against the employer; *Lykes Bros. S. S. Co.* v. *Grubaugh* (C. C. A., 5th), 128 F. (2d) 387, 391, assault on steward by chief engineer in personal quarrel and to show him "who has authority aboard this vessel," evidence insufficient for submission to jury on issue whether assault was in furtherance of master's business (compare *Nelson* v. *American-West African Line* (C. C. A., 2d), 86 F. (2d) 730, where drunken boatswain assaulted a sleeping seaman, saying, "Get up, you big son of a bitch, and turn to"); *Yukes* v. *Globe S. S. Corp.* (C. C. A., 6th), 107 F. (2d) 888, seaman injured in fight

with third assistant engineer starting with an accidental bumping by a door, but where the latter, when he first swung at the seaman, repeatedly asserted, "I am an officer of this ship; I will show you what I mean," affirmed district court in directing verdict for the Steamship Company, saying the *Alpha Steamship Case* (in 35 F. (2d) 717, affirmed, 281 U. S. 642) and *Nelson* v. *American-West African Line*, 86 F. (2d) 730, "mark, however, the limits within which evidence has been held to warrant inference of authority, actual, asserted, or intended, to be exercised by subordinate officers in the business of the ship, leading to assaults upon seamen."

The trend of authorities is well illustrated by the recent decision by the United States Court of Appeals for the District of Columbia in *Park Transfer Co.* v. *Lumbermen's Mutual Casualty Co., et al.*, decided April 24, 1944, App. D. C. , F. (2d) . That decision reversed the action of the district court in refusing to grant a directed verdict for defendant company in a suit seeking to recover damages, as for negligence, for the killing by a felonious assault by defendant's employee of an employee of another company engaged on the same construction work. Smith, a negro, was an employee of Park Transfer Company. Jett was a steamfitter foreman of Norair Engineering Corporation. Both corporations were contractors in the construction of the same building. Smith drank from a pail which belonged to employees of the Norair Corporation. Jett shouted, "Nigger, stay away from that water bucket." Smith, the negro, struck Jett on the head with a six-foot steel pipe and killed him.

Norair's insurance carrier, appellee Casualty Company, paid workmen's compensation to Jett's widow and then brought suit against Smith's employer, appellant Park Transfer Company, to recover damages for the alleged negligent killing by Smith. The Court of Appeals of the District held that as a matter of law the killing of Jett by

Smith was not within the scope of Smith's employment and that the evidence did not support an inference that he was actuated by any other motive than purely personal revenge for Jett's insult. Accordingly, it held Park Transfer Company was not liable to the insurance carrier. It said:

> "Where water is plentiful, a man does not break another's skull in order to get it."

We submit that the court below was unwarranted in refusing to follow *Davis* v. *Green*, 260 U. S. 349, and *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, and in holding this case to be ruled by *Jamison* v. *Encarnacion*, 281 U. S. 635, and *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642.

The court below cited *Brady* v. *Southern Railway Co.*, 320 U. S. 476, and gave lip-service to the controlling principles of law there laid down, including the rule that the evidence must be more than a scintilla before a case under the Federal Employers' Liability Act may be properly left to the discretion of a jury (R. 58-59), yet it sustained recovery in this case in which, we submit, there was not a scintilla of evidence that the shooting and killing of respondent's intestate was, or could have been, committed within the scope of the engineer's employment or in the furtherance of petitioner's business.

The court below, in its opinion (R. 59-60), seemed to treat this Court's most recent decision in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, as being a blanket warrant for submission of any evidence, however speculative or conjectural, to a jury, and as having overruled, again *sub silentio*, *Brady* v. *Southern Railway Co.*, 320 U. S. 476. That, we submit, was error. This Court, in the *Tennant Case*, suggested no doubt whatsoever as to the soundness of the decision in the *Brady Case*. It did not even refer to the *Brady Case*, evidently not deeming the two cases assimilable on the facts and not deeming the decision in the *Tennant Case* inconsistent with that in the *Brady Case*.

That the court below was controlled in its decision in this case by a misinterpretation of the scope and effect of this Court's opinion in the *Tennant Case*, seems clearly indicated from the language of the following order entered by the Chief Justice of the court below, in connection with the overruling of petitioner's petition for rehearing in that court (R. 65), in which order it was said:

> "In the preparation of the opinion in this case, the Court considered all matters referred to in the attached petition for a rehearing, and while frankly admitting that the issue involved is close and not free from doubt, yet in the light of the broad language used in Tennant vs. Peoria & Pekin Union Ry. Co., we adhere to the opinion as filed. In so doing we have the consoling thought that appellant has the further right of appeal to the Supreme Court of the United States, which Court, if it did not intend to narrow the rule as to the granting of nonsuits and direction of verdicts in the Tennant case, can with impunity reverse this Court.
>
> "Petition refused."

That the court below indulged, and held the jury warranted in indulging, a pure speculation or conjecture on the evidence, as ground for holding that the murderous act of Black was committed in the scope of his employment or in the furtherance of petitioner's business, is readily demonstrable.

The complaint alleged two wholly inconsistent theories as to this: (1) that Black shot and killed Jester in the effort to enforce his order to him not to operate the water injector; (2) that Black shot Jester while the latter was using the coal scoop in the performance of his duties as fireman (R. 8-10, see *supra*, p. 3).

Both could not have been true. Either Black shot and killed Jester in connection with the fireman's operation of the water injector, in which case Jester was on or at his seat box on the left side of the locomotive, or he shot and killed him while Jester was on the deck in front of the

fire box engaged in his duty of tending the fire with the coal scoop.

The evidence seems conclusive that the latter was true, since, as the court below showed, Jester's cap, glove and coal scoop were found on the deck of the engine lying together about the center. It is inescapable that he was shot while tending the fire with the scoop, not while he was operating or attempting to operate the injector.

But there is complete absence of evidence that there was any dispute between the two as to how Jester was to tend the fire. The dispute upon which the jury and the court below relied was one which had occurred an hour and a half earlier, at Wellford, which was about the use of the injector.

However, there is no evidence that that original dispute continued throughout the hour and a half and motivated the later shooting. Nothing but pure conjecture can support such theory. In fact, such evidence as there is clearly negatives that theory, since another and wholly different dispute intervened between the injector dispute and the shooting. When the conductor told them to quit fussing (about the injector) and get back on the engine and get their work done, Black and Jester started a wholly new and different dispute, as to which one should precede the other in getting back on the engine. That was a purely personal, grudge dispute between the two, wholly unrelated to any furtherance of the master's business.

If *posteriori hoc ergo propter hoc* be a valid inference from evidence rather than a pure conjecture—and the court below treated it as such as applied to the original injector dispute—then it applies rather to the latest dispute preceding the shooting; and that had nothing to do with the injector or with the manner of firing the engine or with anything related to petitioner's business, but was a purely personal dispute as to precedence in remounting the engine.

a killing in the pursuance of which could not have been "anything but a wanton and wilful act done to satisfy the temper or spite of the engineer." *Davis* v. *Green*, 260 U. S. 349, 351. And for such killing petitioner cannot be liable.

The crux of the decision below, on the evidence, is the following, in which the court below clearly indulged pure speculation or conjecture to sustain the verdict:

> "One and one-half hours prior to the shooting, the engineer and fireman had been in a violent quarrel over the use of the water injector by the fireman on the fireman's side of the engine, and according to the statements made to the conductor, although the engineer had ordered the fireman to desist from the use of the injector, which he had the right to do, the fireman had repeatedly used the injector.[7] The evidence further shows that when the fireman and engineer got back on the engine upon being ordered to do so by the conductor, both were angry,[8] and there was no reason to believe that the fireman would thereafter strictly obey the order of the engineer about the non-use of the injector.[9] We cannot say as a matter of law that it was not a reasonable inference, without entering upon the field of speculation, that immediately prior to getting off the fireman's seat to fire the engine, the fireman again pulled the lever of the water injector on his side of the engine, and that upon this coming to the attention of the engineer, he shot the fireman." (R. 61.)

If ever a decision was based upon pure conjecture or speculation and embodied the "mischance of speculation over

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[7] This was an exaggeration of the testimony. All that the conductor testified the engineer said was, "he told the fireman to keep his hands off the injector and he wouldn't do it" (R. 16).

[8] But what they were then angry and arguing about was "which one would get on the engine first" (R. 17). The fireman actually got on first, and, if *posteriori hoc ergo propter hoc* may substitute for evidence, then it would seem that the engineer killed the fireman because the latter had preceded him on the engine.

[9] Evidently meaning that in the absence of evidence *disproving* the fact it must be presumed. This erroneously puts the burden of proof on the petitioner.

legally unfounded claims" (*Brady* v. *Southern Railway Co.*, 320 U. S. 476, 480, and cases cited), that decision does.

There is no evidence whatsoever that "immediately prior to getting off the fireman's seat box to fire the engine, the fireman again pulled the lever of the water injector," and the suggestion is a pure conjecture based solely on a state of mind which had existed an hour and a half before and when the evidence *does show* that a wholly different state of mind, a new argument about a wholly new subject-matter, later intervened.

Even indulging that unwarranted conjecture, still the killing was not in the furtherance of the master's business. If the engineer shot and killed the fireman while the fireman was tending the fire and after he had immediately previously again pulled the lever of the injector, then the engineer's murderous act could not have been intended or calculated to prevent the act which the fireman had already done. It was capital punishment for a past act of disobedience, which cannot be within the scope of employment or in furtherance of the master's business, but is *ex propria vigore*, "a wanton and wilful act, done to satisfy the temper or spite of the engineer" (260 U. S. at 351).

The very Company Rule 1292 which respondent offered in evidence (R. 22) makes crystal clear what was the duty of the engineer in case of such (conjectured) insubordination by the fireman. That duty was: "report incompetence or neglect of duty to proper officer." It was no part of the duty of the engineer to kill the fireman for an act which the court below conjectured the latter might have done.

As we have pointed out, the only possible intention or effect of the shooting and killing was to put a complete stop to the master's business, not to further it.

The decision below makes petitioner an insurer against malicious, wanton and wilful homicide of one of its employees by another done to satisfy his temper or spite. The

court below recognized that its decision, on the conjectural aspect of the evidence above described, "is not free from doubt" (R. 61).

II.

JURISDICTION.

The date of the judgment sought to be reviewed is April 7, 1944 (R. 51). It became final on April 28, 1944, when the court below overruled petitioner's petition for rehearing (R. 65, 67).

The jurisdiction of this Court is invoked on the ground that petitioner claimed immunity from liability, and asserted rights, under a statute of the United States, i. e., the Federal Employers' Liability Act (35 Stat. 65, 36 Stat. 291, 53 Stat. 1404), 45 U. S. C. 51-59, which claims and rights were denied by a final judgment of the highest court of the State of South Carolina; jurisdiction being therefore invoked under Section 237 of the Judicial Code, as amended, 28 U. S. C. 344 (b). *Brady* v. *Southern Railway Co.*, 320 U. S. 476. *Tennant, Admrx.*, v. *Peoria & Pekin Union Railway Co.*, 320 U. S. 721, certiorari granted.

The pertinent provisions of the Federal Employers' Liability Act are as follows:

> "That every common carrier by railroad while engaging in commerce between any of the several States * * *, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

III.

QUESTIONS PRESENTED.

The three questions presented are stated on pages 2, 3, *supra.*

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision below is in conflict with this Court's decisions in *Davis* v. *Green*, 260 U. S. 349, and in *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, and is contrary to the principle and effect of this Court's decisions in *St. Louis, etc., R. Co.* v. *Mills*, 271 U. S. 344, and *Atlanta & Charlotte Air Line R. Co.* v. *Green*, 279 U. S. 821; and is not warranted by this Court's decisions in *Jamison* v. *Encarnacion*, 281 U. S. 635, and *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, nor by its decision in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, upon all of which the court below relied.

2. The decision below is in conflict with this Court's decisions in *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 480, and in the cases there cited, in that it affirmed a judgment on a verdict unsupported by any evidence or by anything more than a scintilla of evidence, and which was based upon pure speculation or conjecture.

3. Whether *Jamison* v. *Encarnacion*, 281 U. S. 635, and *Alpha Steamship Corp.* v. *Cain*, 281 U. S. 642, had the effect of overruling, *sub silentio*, *Davis* v. *Green*, 260 U. S. 349, and *Atlantic Coast Line R. R. Co.* v. *Southwell*, 275 U. S. 64, and whether their doctrine may properly be extended to cover wilful homicide of a railroad employee by a fellow employee, on the facts in this case, under the Liability Act, is a question of law of public importance which has not been, but should be, settled by this Court.

4. The decision below casts grave doubt upon the scope and effect of the most recent case decided by this Court under the Liability Act, *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, and casts doubt upon *Brady* v. *Southern Railway Co.*, 320 U. S. 476, as a precedent.

5. The decision below has imposed upon petitioner a liability which Congress did not intend or authorize by the Liability Act and which is not within the remedial purposes of that Act.

It is believed that the foregoing petition adequately presents the questions raised, the reason relied on, and the pertinent authorities, without the necessity of filing a supporting brief, such as is permitted, but not required, by Rule 41 (4), and which brief, if filed, would necessarily involve repetition.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted and the judgment below reversed.

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